In the

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11689

WESTERN UNION TELEGRAPH COMPANY, a corporation,

Appellant,

vs.

HANSEN & ROWLAND CORPORATION, a corporation,

Appellee.

FOR THE WESTERN DISTRICT OF WASHINGTON, ON APPEAL FROM THE UNITED STATES DISTRICT COURT SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

CHARLES T. PETERSON
PETERSON & DUNCAN
520 Perkins Building
Tacoma, Washington

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JURISDICTION

Jurisdiction of this court on this appeal is conceded for the reasons set forth in Appellant's brief.

STATEMENT OF CASE

We think a more complete statement of the issues made by the pleadings and of the facts than made by Appellant may be helpful to the Court, and rather than attempt the difficult task of supplement-

ing Appellant's abstract we will endeavor to restate the case.

As disclosed by the record, on December 2nd, 1932, the premises in question were leased by Appellant for a period of six years, which lease contained among others the following provision:

> "Unless either party hereto shall give to the other at least three months prior to the end of said term written notice of his or its desire and intent to terminate this lease at the end of said term, this lease shall continue upon the terms and conditions then in force for a further period of one year and so on from year to year until terminated by either party hereto giving to the other written notice at least three months prior to the expiration of the then current term of his or its desire and intent to terminate this lease at the end of said term."

During the month of May, 1938, the lease was extended by agreement in writing for a period of three years from the 1st day of November, 1938. The provision above set forth in the original lease was by said agreement continued in force, and thereafter on February 27th, 1941, the lease was again extended by agreement in writing for an additional period of five years, ending on the 1st day of November, 1946, and said provision above set forth as again incorporated in the extension agreement.

(Par. III Complaint Tr. P. 4-5) admitted by Answer (Tr. p. 32). The last extension was at an annual rental of $3900.00 payable in monthly installments of $325.00 per month. On July 24th,

1946, Appellee gave Appellant the written notice above provided terminating said lease in accordance with its terms, as of October 31, 1946 (Ex 1, Tr. 40) which was supplemented (probably superfluous) by a further notice as follows:

NOTICE

TO:

Western Union Telegraph Company
Tenants in possession of premises at
1007 Pacific Avenue
Tacoma, Washington

Please Take Notice that the undersigned owner of the following described real property in Pierce County, Washington, to-wit:

> Lot Four (4) in Block One Thousand Three (1003) Map of New Tacoma, W. T., in Pierce County, Washington,

commonly known as House No. 1007 Pacific Avenue in the City of Tacoma, Washington, hereby notifies you that you are hereby required to quit and surrender up to the undersigned owner entitled thereto the possession of the above-entitled premises now occupied by you as tenant, at the expiration of your tenancy on the first day of November, 1946.

Dated at Tacoma, Washington, September 25th, 1946.

HANSEN & ROWLAND CORPORATION,

By Charles T. Peterson,
Agent and Attorney.

(Ex 2 p. 42 Tr.)

In a discussion of the matter on October 8th, 1946, Appellant orally notified Appellee that it

would be unable to vacate the premises on October 31st, 1946. Appellee by letter confirmed an oral proposal to Appellant to extend the term as follows:

Tacoma, Washington
October 8, 1946

Western Union Telegraph Company
1007 Pacific Avenue
Tacoma, Washington

Attention: Mr. R. H. Cobb

Gentlemen:

Referring to your continuing in possession of the premises at 1007 Pacific Avenue, Tacoma, Washington, after October 31st, 1946, please be advised that you may continue such possession for a period not exceeding four months after the expiration of the present lease on the following terms and conditions.

You are to pay, in advance, rental at the rate of $1500 per month, monthly; however, you shall have the option and privilege of vacating and surrendering up the premises at any time during the month, providing you give the owners ten days' written notice of your intention and desire so to do, and upon vacating, the unearned portion of any month's rental will be refunded to you.

Conditions of space in the City of Tacoma are such that it was necessary for the owners to move one of the departments of their business to Seattle pending the time they can get possession of said premises. They regard the premises as having a reasonable rental value of $750.00 per month and the moving of this department to Seattle so that it may be kept intact, and employing of additional help incident to having one branch of their business done in Seattle, will cost at least $750.00 per month, and

undoubtedly, considering the cost of moving, more than that amount.

If you desire to avail yourself of this proposal, you may do so by endorsing your acceptance hereon and returning same to writer.

HANSEN & ROWLAND, INC.,

By Charles T. Peterson,
Agent and Attorney.

We hereby accept and agree to the foregoing:
WESTERN UNION TELEGRAPH COMPANY,

By_____.

(Tr. 37-43-4)

On October 30, 1946, Appellant addressed a letter to Appellee as follows:

Hansen & Rowland Corporation
Hansen & Rowland, Inc.
Tacoma, Washington

Gentlemen:

Re: 1007 Pacific Avenue - Western Union Telegraph Company office space

Herewith is tendered the sum of Seven Hundred and Fifty Dollars in U. S. currency, covering rental for the month of November, 1946—that amount having been claimed and demanded by your letter of October 8, 1946, as the reasonable monthly rental value of the space above mentioned, which this company is compelled by circumstances to occupy until vacation is possible.

Yours very truly,

WESTERN UNION TELEGRAPH COMPANY,
By MERRITT, SUMMERS & BUCEY,
Its Attorneys.

LS/ley
(Ex 4; Tr. 44)

On November 2nd, 1946, Appellee served notice on Appellant as follows:

NOTICE

To: Western Union Telegraph Company, Tenants in possession of premises at 1007 Pacific Avenue, Tacoma, Washington

Please take notice that you are hereby required to pay the rental of $1500.00, which became due and payable on the 1st day of November, 1946, as rental for the premises now occupied by you, to-wit:

Lot Four (4) in Block One Thousand Three (1003) Map of New Tacoma, W. T., in Pierce County, Washington,

commonly known as house No. 1007 Pacific Avenue in the City of Tacoma, Washington, within three days following the date of service of this notice, or in the alternative, to quit, vacate and surrender up to the undersigned owners thereof possession of said premises.

Please govern yourself accordingly.

Dated at Tacoma, Washington, November 2, 1946.

HANSEN & ROWLAND CORPORATION,

By Charles T. Peterson,
Its Agent and Attorney.

(Ex 5; Tr. p. 45-6)

which notice remained uncomplied with. That each month thereafter Appellant made tenders to Appellee of $750.00 per month and kept same good by paying the amount into Court.

Appellee desired Appellant to vacate said

premises to permit remodeling of same (Appellant's Answer, Tr. 35).

It was stipulated (10 Tr. 39), and the Court found as a fact that the reasonable rental value of the premises, at all times material, was $750.00 per month. (Finding 11, Tr. 59). Upon trial of the case the lower court adjudged Appellant guilty of unlawful detainer of the premises and allowed damages in the amount of $750.00 per month, and assessed the penalty in a like amount as provided by the Washington Statute, from which judgment this appeal is prosecuted.

ARGUMENT

Appellant contends that it was not guilty of unlawful detainer, tacitly conceding that if it were Appellee became entitled to the rental value of the premises plus the penalty in like amount, but takes the position that its wrongful holding over after the term constituted "Obtaining the possession of premises without the consent of the owner" and therefore it became a tenant by sufferance under the Washington Statutes, and liable only for reasonable use value. (Brf. pp. 5-6).

It is important here to consider the pertinent Washington Statutes. The unlawful detainer statute provides:

> "*Unlawful Detainer Defined.* A tenant of real property for a term less than life is guilty of unlawful detainer either (1) when he holds

over or continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him. In all cases where real property is leased for a specified term or period by express or implied contract, whether written or by parole, the tenancy shall be terminated without notice at the expiration of such specified term or period; * * * (3) When he continues in possession in person or by subtenant after a default in the payment of any rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner hereafter in this act provided) in behalf of the person entitled to the rent upon the person owning the same, shall have remained uncomplied with for the period of three days after service thereof. * * * (6) Any person who shall, without the permission of the owner and without having any color of title thereto, enter upon the land of another, and who shall fail or refuse to remove therefrom after three days notice, in writing, to be served in the manner provided in this act. O5p173 PC7970 RRS812."

(Sec. 55-5 Pierce's 1943 Code; R.R.S. Sec. 812)

The statute defining Tenancy by sufferance provides:

"*Tenant by Sufferance.* §2057-5. Whenever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he shall be deemed a tenant by sufferance merely, and shall be liable to pay reasonable rent for the actual time he occupied the premises, and shall forthwith on demand surrender his said possession to the owner or person who had the right of possession before said entry, and all his right to possession of said premises shall terminate

immediately upon said demand. PC3556 RRS 10621." (Sec. 719-7 Pierce's 1943 Code; R. R. S. 10621).

"*Tenancy for Specified Time.* §2055-3. In all cases where premises are rented for a specified time by express or implied contract, the tenancy shall be deemed terminated at the end of such specified time. PC3555 RRS10620." (Sec. 719-5 Pierce's 1943 Code; R.R.S. 10620).

It will be seen that to constitute an unlawful detainer, as applied to this case, the facts must meet any one or more of the following tests:

(a) Where premises are leased for a term less than life, a holding over by the tenant after expiration of the term; or

(b) Where premises are rented with monthly rent reserved and tenant defaults in payment of rent and continues in possession after being given three days' notice to pay rent, or in the alternative to surrender possession of the premises; or

(c) In cases where one without permission of owner and without color of title thereto enters upon lands of another and fails to remove therefrom after three days notice in writing.

To constitute a tenancy by sufferance two conditions must be present:

(a) Obtaining possession of premises without the consent of the owner; and

(b) Absence of a demand on the part of the owner for a surrender of possession.

Neither condition is present here. Appellant was let into peaceful possession of the premises by the owner under a valid lease. The statutory written demand was made on Appellant for surrender of possession, which demand was refused.

Approaching the case from any view point it is obvious that Appellant's status answers the tests of the unlawful detainer statute. The fact that prior to the expiration of the term a discussion was had looking to the extension of the term, or the making of a new lease on different terms could not, and did not, operate to terminate the status of Appellant, who was let into possession of the premises for a term by express consent of the owner and held over after expiration of the term, and convert it into a tenancy by sufferance, defined by statute as a status created whenever any person obtains possession of premises without the consent of the owner and retains such possession only in the absence of a demand by the owner to surrender same.

Counsel for Appellant advances a rather ingenious argument to sustain their theory that Appellant was a tenant by sufferance, contending in substance that such relationship arose,

> "As the result of the defendant's possession without the plaintiff's consent in the absence of agreement as to the rate of rental, the de-

> fendant became a tenant at sufferance under Rem. Rev. Stat. § 10621."
> (P. 5 Appellant's Brief).

To follow this contention to its logical end would result in abrogating the unlawful detainer statutes of the state. It would open the way for any tenant wrongfully holding over after the expiration of his term to discuss the terms of a new lease with his landlord and, not agreeing, continue his wrongful holding over, freed of the penalty imposed by statute. In their zeal in pursuit of this illogical theory counsel apparently lost sight of that part of the Tenancy by Sufferance Statute which provides: The tenant

> " * * * shall forthwith on demand surrender his said possession to the owner or person who had the right of possession before said entry, and all his right to possession of said premises shall terminate immediately upon said demand."

Conceding for argument's sake that a tenancy by sufferance came into existence on November 1st, 1946, the three-day written notice served on Appellant on November 2nd, (Ex 5, Tr. 45) demanding payment of the rental of $1500.00, or in the alternative surrender the premises was a sufficient demand for surrender of possession under the Tenancy by Sufferance Statute, and Appellant's failure to heed the Notice brought into operation Section 6 of the unlawful detainer statute, which provides:

> " * * * (6) Any person who shall, without the permission of the owner and without having any color of title thereto, enter upon the

land of another, and who shall fail or refuse to remove therefrom after three days notice, in writing, to be served in the manner provided in this act. O5p173 PC7970 RRS812."

The stark naked controlling facts of the case are that the owner desired possession of the premises at the end of the five-year term expiring on October 31, 1946, and on July 24th, 1946 gave the tenant (Appellant) timely notice of termination of the lease. On October 8th owner discussed with and proposed the terms of an extension or new lease with tenant, confirmed by letter on the same date, stating the terms of such extension or new lease acceptable to owner. The owner's proposal was not expressly accepted by tenant, who made a counter proposal on its own terms (implied by its tender of a certain amount as rent) not acceptable to owner, whereupon tenant elected at its risk to hold over.

Applying the statute law of the State of Washington to the above facts the Court had no alternative but to find Appellant guilty of unlawful detainer.

ESTOPPEL

Appellant by answer sought to plead an estoppel, alleging in substance that it was a public service corporation engaged in a world wide telephone and telegraph business; that the premises in question were an integral part of its system, and that by reason of conditions beyond its control it was unable to vacate the premises, and that the owner intended upon its vacating said premises to remodel the same

and had received a permit from the Civilian Production Administration of the United States, granted only upon condition that Appellant's service to the public be protected and that the work of remodeling be not commenced before December 1, 1946 (Par. 10-11 Answer, Tr. 35-6), and while not particularly arguing the matter in its brief, it advances the fact that it was impossible for it to move at the expiration of the term.

The Supreme Court of the State of Washington is committed to the rule that an estoppel will not lie in an unlawful detainer case. *Morse vs. Healy Lumber Company* 33 Wash. 451, 74 Pac. 662; *Armstrong vs. Burkett*, 104 Wash., 476; 177 Pac. 333. The facts alleged are insufficient to constitute an estoppel in that they lack the essential elements of estoppel, particularly in that there is no claim that Appellant was led to its prejudice in a belief and reliance on conditions created by the owner (19 Am. Jurisprudence pp. 730-733).

PLAINTIFF'S ACTION

Appellant contends that the unlawful detainer statute does not apply because plaintiff elected to treat defendant not as a trespasser but as a tenant (Appellant's Brief, p. 5). On October 8th, 1946, owner notified tenant in writing that it could continue to occupy the premises after October 31, 1946 upon paying advance rental at the rate of $1500.00 per month, and requested tenant, if it desired to

avail itself of the proposal, to endorse its acceptance on the writing (Ex. 3 Tr. 43). Tenant did neither and refused to become a lawful tenant but continued in wrongful possession of the premises. It was plaintiff's contention in the lower court, and its action was brought on the theory that after tenant received definite notice of an increase in rent seasonably given during the term, to become effective at the expiration of the term, and notwithstanding tenant protested the increase and held over beyond the term, that such holding over constituted an implied acceptance of the proposal.

The court in *Commercial Cable Co. vs. McKenna*, 168 NYS 13, in which the facts as stated by the court practically parallel the facts here, sustained such contention. The principle is stated in 24 Cyc. p. 1168, as being supported by the great weight of authority. See also *Tiffany, Landlord and Tenant*, Vol. 2, p. 1493; *Stees vs. Bergmeier* (Minn.) 98 N.W. 648; *Moore vs. Harter* 65 N.E., 883.

We think the lower court erroneously rejected this contention, and while appellee has not appealed from the court's action in this respect, it explains appellee's reason for giving the notice of November 2nd, 1946 demanding rental of $1500.00 per month or in the alternative surrender of the premises, the rejection of which by appellant resulted in the bringing of this action.

HOLDING OVER

The fact that it was inconvenient or, as counsel

says, impossible for Appellant to vacate the premises at the expiration of the term is no defense. *Morse vs. Healy Lumber Company*, supra: *Armstrong vs. Burkett, supra.* The rule is stated by the author of *Tiffany, Landlord and Tenant*, Third Edition, page 1498, as follows:

> "The holding over is not other than willful, because the tenant cannot vacate without great inconvenience and injury to his business."

There would be but little virtue in the forcible entry or unlawful detainer statutes if their manifest purpose could be defeated by a party wrongfully taking or withholding possession of premises and justify his conduct by pleading hardship, inconvenience or inability to vacate and surrender up to one lawfully entitled to possession. It might well be that in such a case the owner having all the equities in his favor, would suffer a greater loss than the offending tenant.

MEASURE OF RECOVERY—DOUBLE THE RENTAL VALUE

Under the stipulated facts, it was agreed that at all times material the reasonable rental value of the premises was $750.00 per month (Tr. 39; Finding Tr. 54), and it is a fact that the rental for the premises during the five-year extension of the lease expiring on October 31, 1946, was $3900.00 per annum, payable in monthly installments of $325.00 each. The Supreme Court of the State of Washington is unqualifiedly committed to the rule that the

reasonable rental value at the time is the measure of recovery.

In the case of *Owens vs. Layton*, 133 Wash., 346, 233 Pac. 645, the Court had occasion to mark the distinction between those cases where a tenant in possession under a valid lease presently in force fails to pay the rent reserved and those cases where the premises are wrongfully held by a former tenant whose lease has expired. In the first situation the damage will be twice the amount of the reserved rent, as provided in the lease. In the second situation, (which applies to the instant case), the measure of damages will be twice the amount of the fair market rental value of the property. In the course of its opinion the court said:

> "The sole question on the appeal arises on the following instruction, which is complained of by the appellants:
>
> " 'The measure of damages will be the fair market rental value of the property. The burden is on the plaintiff to show and prove damages by a preponderance of the evidence. Whatever the preponderance of the evidence shows will be the fair rental value of the property,—fair rental market value of the property during the time it has been retained, if it has been retained, that would be the amount of damages you would award the plaintiff in your verdict.'
>
> "In effect, the argument on behalf of the appellants is that the 'statute makes a distinction between the rent falling due during the period the premises are unlawfully detained and special damages which might accrue dur-

ing that period; that, in the present case, the appellants held over for two months after the termination of their tenancy by a notice to quit, entitling the jury to find a verdict for rent due in the sum of $200, the agreement being $100 per month; and that there was no proof introduced tending to show special damages.'

"The contention misconceives the true situation in important particulars. After November 30, 1923, no rent became due. Rent is an incident of a tenancy, and on that date, as appellants admit or say, the tenancy terminated by the notice to quit that had been given. Thereafter the appellants in holding the premises were trespassers and liable for general damages, not determinable by the rate theretofore paid as rent, but by the market rental value of the premises during the time of trespass."

To the same effect is *Lee v. Debentures Incorporated*, 8 Wash. 2nd, 353, 112 Pac. 2nd, 142; *Sunday v. Moore*, 135 Wash., 414; 237 Pac. 1014; *Reichlin v. First National Bank*, 184 Wash., 304; 51 Pac. 2nd 380.

THE STATUTE AS TO THE PENALTY IS MANDATORY

The court has no discretion in the matter. Neither does a tender and payment into court of an amount equal to the reasonable rental value excuse the enforcement of the statute. In *Armstrong v. Burkett*, 104 Wash., 476, 177 Pac. 333, the court said:

"Counsel bitterly complains that, having tendered and paid into court the rent from August 15 up to the time of the trial, being for the intervening time, the court should not visit the

penalty of the statute upon his client. Our heart is with him and with his client, but the statute Rem. Code § 827, must guide our hand. It leaves no legitimate ground for the exercise of our sympathy. The trial judge had no discretion, nor have we. *Newman v. Worthen*, 57 Wash. 467, 107 Pac. 188; *Bond v. Chapman*, 34 Wash. 606, 76 Pac. 97; *O'Connell v. Arai*, 63 Wash. 280, 115 Pac. 95; *Shannon v. Loeb*, 65 Wash. 640, 118 Pac. 823.

"It is no answer to say that plaintiffs might have withdrawn the money as it was paid in. A suit pending, it is likely that an acceptance of the amount tendered would have satisfied counsel's theory, a hazard plaintiffs were not called upon to take. It was their privilege to fix the legal rights of the parties as of the day of forfeiture."

In *Reichlin vs. First National Bank*, 184 Wash., 304, the court said:

" * * * The value of the use and occupancy therefore, was, under what seems to be the universal rule, the sole measure of damages. The value of the use and occupancy and the fair rental value seem to be one and the same thing, and under the issues submitted to the jury, no verdict could be properly returned save one based upon that measure.

"3 Sedgwick on Damages (9th ed.) § 99e, gives the rule as follows:

" 'Where one occupies land of another without an express covenant to pay rent, the owner may recover the rental value of the land in an action for use and occupation. The rental value is the actual value for profitable use, not the value of the use which the owner meant to make of it.' "

(Op. 311) Citing the case of *Owens v. Layton*, supra.

In *Davis v. Jones*, 15 Wash. 2nd, 572, 131 Pac. 2nd, 430, the Court had occasion to again consider the effect of tender and payment into court, in which case it reiterated, in substance, the statement in the Armstrong case, saying:

> " * * * Defendant also tendered and paid into court the rent from date of termination of her tenancy to the time of trial of the action. She argued that by reason of that tender and payment into court that the penalty of the statute (Rem. Rev. Stat. § 827)—judgment for double the amount of rent accrued—should not be visited upon her. We held that while our heart was with appellant we must be guided by the statute (Rem. Rev. Stat. § 827) which left no legitimate ground for the exercise of our sympathy; that the trial court was without discretion, as were we."
>
> (Op. 579).

The following additional cases may be consulted:

> *Lowman vs. Russell*, 133 Wash. 10, 233 Pac. 9; *McDuffie v. Noonan*, 176 Wash. 436, 29 Pac. 2nd 684.
>
> Measure of damages and penalty.
> *Fisher Executor v. Clark*, 98 Wash. 382, 167, Pac. 1103.

Hinckley v. Casey, 45 Wash. 430, 88 Pac. 753, where it was contended that the court may double the damages in unlawful detainer cases only where the action is brought for the nonpayment of rent. The Court (Justice Rudkin) said:

" * * * The penalty is not imposed for the nonpayment of rent, as the defendants suggest. If it were, the act could not be sustained on constitutional grounds. The penalty is imposed for the refusal to surrender possession on the termination of the tenancy, whether it be terminated by the terms of the lease, for nonpayment of rent, or for any of the other causes specified in the statute. The question is not a new one in this court. Double damages were allowed in *Hart v. Pratt*, 19 Wash. 560, 53 Pac. 711; *Quandt v. Smith*, 28 Wash. 664, 69 Pac. 369, and *Bond v. Chapman*, supra. Each of these actions was for an unlawful detainer, and in neither case was the tenancy terminated for the nonpayment of rent.

"The judgment is reversed and the case remanded with direction to enter judgment for double damages as prayed in the complaint."

Followed in *Swanson v. Stubb*, 108 Wash., 170, 183 Pac. 91, where the Court (Fullerton) said:

" * * * The exception noted is the contention that the court erred in entering judgment for twice the amount of the damages returned by the jury. It is argued that the statute (Rem. Code, § 827) permits such doubling only in cases where the verdict of the jury is founded on nonpayment of rent. But the question does not require discussion. It was met and determined by this court contrary to this contention in the case of *Hinckley v. Casey*, 45 Wash. 430, 88 Pac. 753."

(Op. 173).

Bond v. Chapman, 34 Wash. 606, 76 Pac. 97, where the court held that it was not competent to interpose an equitable defense in an unlawful de-

tainer action. That the penalty statute was so plain that it was not susceptible of construction.

O'Connell v. Arai, 63 Wash. 280, 115 Pac. 95 (En Banc) holding penalty statute mandatory, and quoting with approval from *Hinckley v. Casey*, supra.

In discussing the purpose of a statute imposing a penalty for holding over, the Author of Tiffany, Landlord and Tenant, Third Edition, page 1498, says:

> "The purpose and effect of the rule appear to be to impose a penalty upon the tenant wrongfully holding over, and this penalty it adjusts without reference to the actual wrong inflicted upon the landlord as measured by the period of the holding over, or to the culpability of the tenant."

CASES CITED BY APPELLANT

In support of its contention that appellant was a tenant by sufferance, counsel cite *Klee v. U. S.*, 53 Fed. (2d) 58, a criminal prosecution for liquor law violation. The decision of the case hinged upon the question of whether or not defendant, who was in possession of the premises was a trespasser, which status would preclude him from claiming the benefit of the Fourth Amendment with repect to searches and seizures. According to the facts stated, the officers sought to justify their entry of the premises by the terms of lease given by the proprietor of a farm to one Hill. Proprietor died and it was claimed his

executor gave the Federal officers permission to enter the premises for the purpose of searching. The lease contained a provision against assignability without the consent of the proprietor, and the executor denied having given any consent. On the other hand, defendants claim they were occupying the dwelling under a subletting from Hill and denied the authority of the executor to give anyone the right to enter and search the premises. We have read and re-read the case with care and it does not appear to us there is anything contained in the opinion that has any bearing on the questions involved in this case.

McCourtie v. Bayton, 159 Wash. 418 (page 11 Appellant's Brief). Action for damages by child of tenant suffering injuries as result of defect in premises. The facts show that tenant, with consent of Agent or landlord entered possession of premises pursuant to agreement of lease, but two or three days prior to effective date of lease. The tenancy by sufferance statute was only referred to incidentally. Clearly, the case is not an authority here.

Provident Mutual Life Insurance Company vs. Thrower, 155 Wash. 613, involved a dispute as to whether or not any rent was agreed upon between the parties. After occupant had been in possession of premises for a period, agent of landlord served notice on occupant claiming rent at the rate of $100.00 per month. Since the jury found by its verdict that there was no agreement as to rent, the court held that recovery could be had on *quantum meruit.*

We do not understand on what theory the case may be regarded as an authority here. In the Provident case the owner consented to the occupancy of the premises by the tenant without any agreement as to rent, as the jury found. The action was for past due rent. In the instant case the owner notified defendant before any rent accrued that the rental would be $1500.00 per month, as it had a right to do, and upon failure to pay it promptly demanded payment or, in the alternative, the surrender up of possession of the premises, neither of which demands were complied with by the tenant, whose occupancy thereafter was without the consent of the landlord.

The case of *Williamson v. Hallett*, 108 Wash. 176 (Appellant's Brief p. 12), held that where one entered premises without owner's consent and owner thereafter demanded rent and occupant continued in possession of premises, the relationship of landlord and tenant was created by implication. The court held that an unlawful detainer action on the facts stated could be maintained, and referred only to the tenancy by sufferance statute incidentally, it being the defendant's contention that she never was in possession of the premises.

CONCLUSION

It is crystal clear that Appellee's action on the liability of Appellant rests entirely on the status of the parties created by the making of the original lease back in 1932, the terms of which were extended to October 31st, 1946, when it terminated. Under

the terms of this lease Appellant went into lawful possession of the property, which lawful possession continued until and including the 31st day of October, 1946. It is unimportant and immaterial that Appellee offered to extend the lease for a period at the rental of $1500.00 per month, which Appellant did not expressly accept or reject, but held over and attempted to exercise the prerogatives of the owner and fix the rent of its property at $750.00 per month by tendering that amount, which tender the owner refused. Since such holding over by the tenant was without the consent of the owner, the tenant became liable for the reasonable rental value plus the penalty provided by statute. In the final analysis of the matter the decision of this case turns on the question of consent by the owner. The record makes it perfectly clear that the only consent to continue occupancy by the tenant was conditioned on the payment by the tenant of $1500.00 per month rental. Holding over without the consent of the owner, under the unlawful detainer statute, made the tenant liable for the amount of the judgment awarded by the trial court. Assuming that the tenancy by sufferance statute has any place in the case, we have the demand for surrender up of possession of the premises made on November 2, 1946 uncomplied with, which brings the case within Section 6 of the unlawful detainer statute and subjects tenant to the same liability. It appears to us that the appeal in this case is so devoid of merit, and is so strongly impressed with the ap-

pearance of having been sued out merely for delay, that this court should award additional damages at a rate not exceeding 10%, in addition to interest, as provided by Rule 26 of this court.

Respectfully submitted,

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